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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SALVADOR AGUIRRE, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B233228 (Los Angeles County Super. Ct. No. BC428221)

APPEAL from an order of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Reversed and remanded.

Mitchell Keiter for Plaintiff and Appellant.

Coleman & Associates, John M. Coleman and Stephanie H. Hsieh for Defendants and Respondents.

Appellant and plaintiff Salvador Aguirre sustained serious injuries while in the custody of respondent and defendant Daniel Riordan, a deputy of the Los Angeles County Sheriff's Department. Aguirre sued Riordan and his employer, respondent and defendant Los Angeles County (County), asserting federal civil rights and state law tort claims. After Aguirre rested his case in a jury trial, the trial court granted respondents' motion for nonsuit, and then entered an order of dismissal. We shall reverse the order and remand the case for a new trial.

FACTUTAL AND PROCEDURAL BACKGROUND[1]

1. *The Incident*

The events which led to this lawsuit occurred on December 26, 2008. Aguirre was 18 years old. He and several of his friends planned on attending a punk rock concert at the Key Club in West Hollywood. Before going to the concert, Aguirre and his friends drank alcoholic beverages and smoked marijuana at Aguirre's home in Echo Park. Aguirre travelled from his home to the Key Club with his girlfriend Samantha Narcho by bus.

Once Aguirre and Narcho arrived at the Key Club, they purchased tickets to the concert and then went to a parking lot across the street and met about six friends there, including Johnny Quintana and Brian Cabezas. In the parking lot Aguirre and his friends drank beer for about 30 minutes or an hour.

Aguirre and Narcho then went into the club. After about 10 minutes, the couple went outside to look for a friend and to smoke a cigarette. Once they finished smoking, Aguirre and Narcho went back in line to re-enter the club. About five minutes later, as Aguirre and Narcho were standing arm in arm, two police officers suddenly approached Aguirre, grasped his arms and escorted him away from the line and towards Riordan, who was standing beside his police vehicle.

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[1] We summarize the facts in a light most favorable to Aguirre, making all reasonable inferences from the evidence in his favor. (*Casteneda v. Olsher* (2007) 41 Cal.4th 1205, 1214 (*Casteneda*).)

At this point, Aguirre had consumed a total of about five beers and one shot of vodka, and had smoked a "bowl" of marijuana. Aguirre contends that he was "buzzed" but not "drunk." According to Aguirre, Narcho, Quintana and Cabezas, Aguirre was not stumbling or walking unsteady, his eyes were not bloodshot, he did not smell of alcohol, and he was not slurring his words.

As Aguirre was being escorted to Riordan, he asked the two police officers, Deputies Michael Egan and Tai Plunkett, why he was being arrested. The officers, however, did not explain. Once Aguirre and the two officers reached the police car, Riordan quickly placed Aguirre in handcuffs with his hands behind his back. Aguirre again asked the officers why he was being arrested. The officers responded by saying, "Shut the fuck up" and "You know what you did." Aguirre was "scared" that the police had arrested the wrong individual.

Aguirre then moved about "three or four steps" away from Riordan.[2] According to Aguirre, he did not intend to run away. Rather, he was trying to "clarify why [he] was being arrested." Riordan then "dove" at and tackled Aguirre "like . . . a football player would tackle someone." Plaintiff landed face first on the ground, and he saw a "white flash" upon impact.

While Aguirre was on the ground, Riordan placed his right knee on the back of plaintiff's neck and put all his weight on Aguirre. Aguirre was not resisting at the time. On the date of the incident, Aguirre weighed about 140 pounds and was about five feet 11 inches tall.

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[2] Riordan testified that Aguirre was "one to two steps" away. Narcho testified that Aguirre "took a few steps, a few feet." Cabezas testified that Aguirre "jiggled around and he kind of like . . . stepped back a little bit . . . ." He also stated that Aguirre was a "couple steps" away, "probably like three feet." Quintana testified that Aguirre was "moving to the side."

2. *Aguirre's Injuries*

Aguirre sustained very serious injuries. He fractured his jaw from at least two different impacts on the ground. This required having his jaw wired shut for over four months. Because he could not eat solid food, Aguirre lost 15 pounds, more than 10 percent of his weight.

Aguirre also lost two front teeth and had other serious dental problems as a result of the incident. In total, Aguirre had about six or seven dental surgeries, and at the time of the trial needed significantly more dental work.

Aguirre also had many other injuries, including a concussion, a split lip requiring deep sutures, coagulated blood in his ear which impaired his hearing for two or three months, and migraines. For the entire year of 2009, he was in pain every day. He also developed stomach problems as a result of taking so much pain medication.

3. *Second Amended Complaint – Causes of Action at Issue on Appeal*

Aguirre commenced this action on December 17, 2009. In his operative pleading, the second amended complaint, Aguirre set forth causes of action for (1) assault, (2) battery, (3) false arrest, (4) false imprisonment, (5) violation of federal civil rights (42 U.S.C. § 1983) based on false arrest and imprisonment, (6) violation of federal civil rights (42 U.S.C. § 1983) based on excessive force, (7) intentional infliction of emotional distress, (8) "municipal" violation of federal civil rights (42 U.S.C. § 1983), (9) violation of the Bane Act (Civ. Code, § 52.1), (10) negligent hiring, training and retention, and (11) negligence.

On October 13, 2010, the trial court sustained the County's demurrer to the fifth, sixth and eighth causes of action without leave to amend. Aguirre does not, on appeal, assert any arguments regarding his federal civil rights causes of action with respect to the County or Riordan. He also does not make any arguments relating to his intentional infliction of emotional distress, Bane Act, or negligent hiring causes of action. Thus the only causes of action we are concerned with are Aguirre's false arrest, false imprisonment, assault, battery, and negligence causes of action. Aguirre has forfeited

any arguments he may have with respect to his remaining causes of action. (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1064, fn. 2.)

4. *Trial*

The court conducted a jury trial on the first three days of February 2011. Aguirre, Narcho, Quintana and Cabezas testified about the incident of December 26, 2008. Their testimony supported our description of the events of that day.

Aguirre also called as witnesses Deputies Riordan, Egan, and Plunkett, and Sergeant Angela Gonzalez. The police officers' version of events was materially different than Aguirre's in many ways.

Riordan testified that he received a complaint by a parking valet regarding two males drinking alcohol in the Bank of America parking lot, which is on the same side of the street as the Key Club. This is a different parking lot than where Aguirre and his friends claim they were drinking, which is located across the street.

Riordan further testified that he saw two males walking from the Bank of America parking lot towards the Key Club. One of the males, which Riordan later identified as Aguirre, was swaying, and walking in a labored manner. The two men then sat on an exterior low retaining wall outside the Key Club. While there, Aguirre allegedly swayed in a "circular motion." Riordan did not see Aguirre with a female. Narcho, however, testified that Aguirre never went to the Bank of America parking lot and never sat on a low retaining wall. She also stated she did not separate from Aguirre that evening until he was arrested.

Contrary to the testimony of Aguirre and his friends, the police officers testified that Aguirre was having difficulty walking on his own, he slurred his speech, he had bloodshot eyes, and he smelled of alcohol. The officers also testified Aguirre "ran" away from Riordan and that after Riordan brought Aguirre to the ground, he placed his shins over Aguirre's buttocks and upper legs. These facts, too, were disputed by Aguirre and his friends.

The police officers testified that at the time of Aguirre's arrest, there was a crowd of about 25 to 40 people, most of whom were dressed in punk rock attire. At some point, a portion of the crowd advanced toward the officers and started shouting profanities at them. Referring to Aguirre, people in the crowd also shouted, "Let him go" and "He didn't do anything." The officers drew their weapons and told the crowd to stay back.

In addition to evidence about the incident, Aguirre presented evidence regarding his injuries and the appropriateness of Riordan's conduct. Dr. Vincent Sghiatti testified as an expert regarding Aguirre's injuries. Dr. Sghiatti stated, inter alia, that plaintiff had at least two different point-of-impact blunt traumas to his facial area, one on the left side and another on the right. Aguirre's expert on police conduct, Lawrence Kirkley, testified that there was insufficient probable cause for Riordan to arrest Aguirre. Kirkley also opined that "the tackling of a handcuffed subject from the back was improper."

5. *Motion for Nonsuit and Order of Dismissal*

On February 3, 2011, after Aguirre rested his case, counsel for respondents orally moved for a nonsuit. The trial court announced from the bench that it was granting the motion. In so ruling, the court explained that Riordan had qualified immunity from federal civil rights claims. Although the court did not clearly indicate the grounds for granting the motion with respect to Aguirre's state law claims, it appears the court agreed with respondents' argument that they were immune from liability under Government Code section 845.8, which we shall discuss *post*.

Before the trial court finished announcing its oral ruling on respondents' motion for nonsuit, Aguirre made an oral request to reopen the case in order to allow his two experts, Kirkely and Dr. Sghiatti to testify again. As to Dr. Sghiatti, Aguirre stated he would "say that there [were] two independent traumas that occurred to [Aguirre's] body and that one of those traumas was independently caused by a knee to the back of his head." The court denied the motion.

On March 11, 2011, the trial court entered an order granting respondents' motion for nonsuit and dismissing Aguirre's action in its entirety. Aguirre filed a timely notice of appeal of the order.

DISCUSSION

1. *Standard of Review*

We review an order granting a nonsuit de novo. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1124 (*Wolf*).) " 'The rule is that a trial court may not grant a defendant's motion for nonsuit if plaintiff's evidence would support a jury verdict in plaintiff's favor. [Citations.] [¶] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff[']s evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff[']s favor . . . ." ' "[3] (*Casteneda*, *supra*, 41 Cal.4th at p. 1214.) Thus if there is substantial evidence supporting any of plaintiff's causes of action, we must reverse the order. (*Wolf*, at p. 1125.)

2. *There Was Substantial Evidence Supporting the False Arrest and False Imprisonment Causes of Action*

" '[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671,

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[3] Respondents repeatedly disregarded this standard of review in their brief by relying on evidence contradicted by other evidence presented by Aguirre and by making inferences from the evidence in their favor. Additionally, throughout most of their brief, respondents failed to provide citations to the record in violation of California Rules of Court, rule 8.204(a)(1)(C). Indeed, in their statement of facts, respondents did not provide a single citation to the record.

673; accord *McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, 1281, fn. 2.)

The elements of false arrest are (1) defendant arrested plaintiff without a warrant, (2) plaintiff was actually harmed and (3) defendant's conduct was a substantial factor in causing plaintiff's harm. (CACI No. 1401; see also *City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 810.) A peace officer, however, cannot of course be liable for false arrest if he or she lawfully arrests the plaintiff. (CACI No. 1402.)

In this case, Riordan arrested Aguirre without a warrant for violating Penal Code section 647, subdivision (f), which prohibits public drunkenness. The statute provides that a person who "is found in any public place under the influence of intoxicating liquor . . . in a condition that he or she is unable to exercise care for his or her own safety or the safety of others . . . or obstructs or prevents the free use of any street, sidewalk, or other public way," is guilty of a misdemeanor. (Pen. Code, § 647, subd. (f).) A peace officer may arrest an individual for violating Penal Code section 647, subdivision (f) without a warrant if the officer has "probable cause" to believe that the person has committed the offense "in the officer's presence." (Pen. Code, § 836, subd. (a)(1).) "Probable cause is measured by an objective standard based on the information known to the arresting officer, rather than a subjective standard that would take into account the arresting officer's actual motivations or beliefs." (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1045.)

In determining whether the trial court properly granted respondents' motion for nonsuit with respect to Aguirre's false arrest and false imprisonment claims, we must decide whether there was substantial evidence for the jury to conclude Riordan did not have probable cause to believe Aguirre violated Penal Code section 647, subdivision (f) in his presence. We shall conclude there was such evidence.

Viewed in a light most favorable to Aguirre, the evidence indicates that Riordan mistakenly assumed Aguirre was the apparently intoxicated individual who emerged from the Bank of America parking lot. Further, if we believe the testimony of Aguirre

and his friends, as we must at this stage, Aguirre exhibited no signs of being intoxicated while he was waiting in line with his girlfriend or at any other time he was observed by Riordan. A reasonable jury could have concluded Riordan did not have probable cause to arrest and detain Aguirre. The trial court therefore erred in granting respondents nonsuit on Aguirre's false arrest and false imprisonment claims.

3. *There Was Substantial Evidence Supporting the Assault, Battery and Negligence Causes of Action*

When a police officer makes or attempts to make an arrest, he or she may use "reasonable force to effect the arrest, prevent escape or to overcome resistance." (Pen. Code, § 835a.) If the officer, however, uses unreasonable (i.e. excessive) force in the course of effecting an arrest, preventing an escape or overcoming resistance, and in doing so causes injury to the suspect, he or she may be liable to the suspect for assault and battery for intentional conduct (*Burden v. Snowden* (1992) 2 Cal.4th 556, 568, fn. 17; *Larson v. City of Oakland* (1971) 17 Cal.App.3d 91, 92, 98), and negligence for lack of due care (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586-588 (*Grudt*); *Munoz v. Olin* (1979) 24 Cal.3d 629, 634.)

The test for whether a police officer uses reasonable or excessive force is an objective one. (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1102.) " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." ' " (*Ibid*; accord *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527.)

Whether a police officer used reasonable force is a question of fact. (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 989.) The issue we must decide therefore is whether there was substantial evidence supporting a jury finding that Riordan used excessive force in detaining Aguirre and preventing him from escaping. We shall conclude there was such evidence.

Viewed in a light most favorable to Aguirre, the evidence indicates that after Aguirre took a few steps away from Riordan and was about three feet from the officer, Riordan tackled Aguirre like a football player. Aguirre was vulnerable to this tackle because he had his hands handcuffed behind his back and no way to break his fall except with his jaw. The evidence further indicates that while Aguirre was on the ground and not resisting arrest, Riordan placed his knee on Aguirre's neck and put all his weight on him. A reasonable jury could have found Riordan used excessive force, and that he could have used less force to keep the hand-cuffed and at least partially inebriated Aguirre from fleeing.[4] The trial court therefore erred in granting respondents' motion for nonsuit with respect to Aguirre's assault, battery and negligence causes of action.

Aguirre cited many cases in his brief to support this conclusion. We shall discuss two of them.

In *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728 (*Schmidlin*), the plaintiff was arrested for, inter alia, public intoxication, and was allegedly physically abused while in police custody. (*Id.* at p. 736.) The plaintiff sued the police officers who arrested him and their employer for various constitutional and state law torts. The jury found that the officers had used excessive force against the plaintiff and returned a verdict in his favor. (*Id.* at p. 735.)

One of the issues on appeal was whether there was substantial evidence to support a finding of excessive force. (*Schmidlin*, *supra*, 157 Cal.App.4th at p. 737.) Instead of discussing all of the facts in support of the verdict, the defendants' brief was "devoted almost entirely to rearguing the facts." (*Id.* at p. 737.) The court held that the defendants "waived" their arguments on appeal and, in any event, there was substantial evidence to support the jury verdict. (*Id.* at pp. 738-739.)

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[4] Contrary to respondents' contention, such a finding would not be "speculation." "It is a pure question of fact whether a police officer used reasonable force in detaining a defendant" (*In re Joseph F.*, *supra*, 85 Cal.App.4th at p. 989), and thus the issue of whether Riordan used excessive force was a jury question.

Likewise, in this case, respondents make many factual assertions and arguments, often without citing the record, that we cannot consider on appeal. For example, respondents contend that Aguirre was "attempting to flee" even though Aguirre disputes he was running away. Respondents also disregard the testimony that Riordan "tackled" Aguirre, and claim that Riordan merely "reached out" to secure Aguirre and, in doing so, both Riordan and Aguirre "fell to the ground." As we have explained, however, we can only consider the evidence that favors Aguirre's version of events, and we must draw all inferences from the evidence in his favor.

In *Grudt*, the plaintiff's husband was shot and killed by the defendant police officers after he allegedly disobeyed the officers' orders. At trial the plaintiff's witnesses presented a different version of the event than the police officers. For example, contrary to the defendants' testimony, one witness testified that the decedent's car did not move away from the officers before the decedent was shot. (*Grudt, supra*, 2 Cal.3d at p. 582.) The trial court nonetheless granted the defendants' motion to exclude the plaintiff's negligence claim from the jury's consideration, which was the "equivalent to a motion for nonsuit." (*Id.* at p. 586.) The California Supreme Court, however, reversed. Viewing the evidence favorably to the plaintiff, the court held the jury could have found that the defendant officers were negligent. (*Id.* at p. 587.)

The present case is similar to *Grudt.* If the jury believed the testimony of Riordan and his law enforcement colleagues, there was clearly sufficient evidence for it to find in respondents' favor. We recognize, however, that critical facts were disputed and a reasonable jury, if it believed the testimony of appellant and his friends, could have gone the other way. This was not the sort of case in which a nonsuit can be granted.

4. *Respondents Do Not Have Immunity Under Government Code Section 845.8*

Government Code section 845.8 provides: "Neither a public entity nor a public employee is liable for: [¶] (b) Any injury caused by:

"(1) An escaping or escaped prisoner;

"(2) An escaping or escaped arrested person; or

"(3) A person resisting arrest."

Respondents contend that as a matter of law they were immune from liability under this statute. We disagree. There was substantial evidence to support Aguirre's assertions that he was not an "escaping or escaped arrested person" or a "person resisting arrest," and that his injuries were not "caused by" his conduct. Aguirre claims he only stepped away from Riordan and was not running away. He also contends he was not resisting Riordan when he was on the ground. The testimony of his friends supports these contentions. Further, a reasonable jury could have concluded that Aguirre's injuries were caused by Riordan's tackle, and not by anything Aguirre did.

Respondents' reliance on *Ladd v. County of San Mateo* (1996) 12 Cal.4th 913 (*Ladd*) is misplaced. There, the plaintiff was a juvenile ward of the court. While she was being driven by the defendant police officers to juvenile hall, the vehicle stopped for a red traffic signal near some railroad tracks. Although she was handcuffed, the plaintiff jumped out of the vehicle and tried to climb aboard a boxcar, but fell beneath the wheels of the train, resulting in the loss of both of her legs. (*Id.* at pp. 916-197.) The issue before the court was whether Government Code section 845.8 provided immunity against claims based on "self-inflicted" injuries, i.e. "injuries caused by a prisoner to herself." (*Ladd,* at p. 920.) The California Supreme Court held that the statute provided immunity against such claims. (*Ibid.*)

The present case is distinguishable from *Ladd*. As we have explained, we cannot conclude that as a matter of law Aguirre's injuries were self-inflicted or caused by his own conduct. Indeed, in viewing the evidence in a light most favorable to Aguirre, we cannot even conclude that he was an "escaping or escaped arrested person" or a person "resisting arrest." *Ladd* thus lends no support to respondents' immunity defense.

5. *The Doctrine of Qualified Immunity Does Not Apply to State Law Claims*

Riordan argues he has qualified immunity from liability to Aguirre. The doctrine of qualified immunity, however, " 'is a federal doctrine that does not extend to state tort claims against government employees.' " (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1243.)

6. *Aguirre May Pursue a Negligence Cause of Action Against the County*

The County argues it cannot be liable to Aguirre for "common law" negligence. It bases this argument on Government Code section 815, which provides that a public entity cannot be liable for injuries caused to other persons by public employees except as provided by statute.

A quarter century ago, in *Walker v. County of Los Angeles* (1987) 192 Cal.App.3d 1393, 1397 (*Walker*), the County made the same argument. The *Walker* court rejected the argument then, as we do now. The court correctly stated: "What this argument neglects to recognize is that Government Code section 815.2 provides the statutory basis for this and many other causes of action." [5] (*Walker*, at p. 1397.) By asserting the argument again, without mentioning *Walker*, the County has taken a frivolous position.

[5] Government Code section 815.2, subdivision (a) provides: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

DISPOSITION

The order of March 11, 2011, is reversed and the case is remanded for a new trial. Appellant Salvador Aguirre is awarded costs on appeal.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.